

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 CARLOS MENDOZA, individual, and as
12 guardian of L.M., his minor child,

13 Plaintiffs,

14 v.

15 CITY OF VANCOUVER, a Municipality;
16 VANCOUVER POLICE DEPARTMENT,
17 an agent of the City of Vancouver;
18 MONICA HERNANDEZ and "JOHN
19 DOE" HERNANDEZ, husband and wife,
individually and the marital community
thereof; BARBARA KIPP and "JOHN
DOE" KIPP, husband and wife and the
marital community thereof,

Defendants.

CASE NO. 16-5677 RJB

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT
AND OTHER MOTIONS AND
ORDER TO SHOW CAUSE

20 This matter comes before the Court on the Defendants' Motion for Summary Judgment
21 (Dkt. 58) and Plaintiffs' Motion for Partial Summary Judgment (Dkt. 68), Plaintiffs' two Motion
22 to Strike (Dkts. 68 (refiled at 86 and 87); and 97) and Defendants' Renewed Motion to Exclude
23
24

1 Gregory Gilbertson (Dkt. 73). The Court has considered the pleadings filed in support of and in
2 opposition to the motions and the file herein.

3 Plaintiffs filed this case asserting that their constitutional rights were violated when
4 Plaintiff Carlos Mendoza was arrested and his son, Plaintiff L.M., was taken into protective
5 custody. Dkt. 4-4. Plaintiffs seek damages as well as attorneys' fees and costs. *Id.* Defendants
6 move for summary dismissal of all claims (Dkt. 58) and Plaintiffs move for summary judgment
7 on the issues of whether Defendant Vancouver Police Department Detective Monica Hernandez
8 had legal authority to arrest Plaintiff Mendoza, whether Defendant Vancouver Police Department
9 Detective Sergeant Barbara Kipp had legal authority to take L.M. into custody, and whether
10 Defendant Kipp had cause to believe L.M. had been neglected (Dkt. 68). For the reasons
11 provided, the Defendants' motion (Dkt. 58) should be granted, in part, and stricken, in part;
12 Plaintiffs' motion for partial summary judgment (Dkt. 68) should be denied as it relates to the
13 federal claims, and stricken as it relates to the state law claims; Plaintiffs' motions to strike
14 (Dkts. 68 (refiled at 86 and 87) and 97) should be denied; and Defendants' Renewed Motion to
15 Exclude Gregory Gilbertson (Dkt. 73) should be stricken. Further, the parties should be ordered
16 to show cause, if any they have, why this Court should not decline to exercise supplemental
17 jurisdiction over the state law claims and remand the case to Clark County, Washington Superior
18 Court.

19 **I. RELEVANT FACTS AND PROCEDURAL HISTORY**

20 This case involves an unusual number of people. Attached to the order is a list of parties,
21 witnesses and others, with a brief explanation of their roles.

22 **A. RELEVANT FACTS**

23

24

1 On April 23, 2014, the Washington State Department of Social and Health Services
2 (“DSHS”) filed a dependency petition in Clark County, Washington Juvenile Court alleging that
3 Plaintiff Mendoza’s son, L.M., was dependent because of abuse allegations against the child’s
4 mother, Tara Mendoza. *In re Dependency of L.M.*, Clark County Superior Court case number
5 14-7-00508-5, in the record at Dkt. 59-12, at 2-8. L.M., who at the time was a year old, had a
6 total of eight broken bones in his arms and legs. *Id.* Tara Mendoza was arrested by Defendant
7 Hernandez around April 30, 2017, on charges of first degree assault of a child. *Washington v.*
8 *Tara Mendoza*, Clark County, Washington Superior Court case number 14-5521, in the record at
9 Dkt. 60-1, at 10. On May 1, 2014, a no-contact order was entered in the criminal case preventing
10 Tara Mendoza from having contact with L.M. *Washington v. Tara Mendoza*, Clark County,
11 Washington Superior Court case number 14-5521, in the record at Dkt. 76-1, at 20.

12 Plaintiff Mendoza, an E2 in the United States Marines, was stationed at Meridian Naval
13 Air Station in Meridian, Mississippi for a ten day training program (which occurred right after he
14 graduated from boot camp). Dkt. 84, at 3, refiled as redacted at Dkt. 90. He was notified of the
15 allegations regarding Tara Mendoza and L.M. around April 23, 2014. Dkt. 60-1, at 15. On April
16 29, 2014, he received orders and flew to his first permanent duty station in North Carolina. Dkt.
17 84, at 3, refiled as redacted at Dkt. 90.

18 After receiving permission from his North Carolina command for two days of emergency
19 humanitarian leave, on Thursday night, May 1, 2014, Plaintiff arrived in Vancouver,
20 Washington. Dkt. 84, at 3, refiled as redacted at Dkt. 90. Plaintiff Mendoza was ordered to
21 check in with Swan Island Oregon Reserves Station in Portland, Oregon (“Swan Island”), to
22 attempt to get a temporary transfer to a Marine unit there in order to address his family issues.
23 *Id.* (Vancouver, Washington and Portland, Oregon are separated only by the Columbia River).

1 He states that “as a new Marine” he did not fully “understand how things worked,” and arrived
2 without the leave order paperwork in his possession. *Id.* His temporary leave expired at
3 midnight on May 2, 2014, and he had to return to North Carolina if he did not get the temporary
4 transfer to Swan Island. *Id.*

5 The next morning, May 2, 2014, he attended a juvenile court hearing at 9:00 a.m. across
6 from the main Clark County, Washington courthouse and jail. Dkt. 84, at 3, refiled as redacted
7 at Dkt. 90. According to Plaintiff Mendoza, around 10:30 or 11:00 a.m., he walked over to the
8 jail to speak to his then wife, Tara Mendoza, about the situation. *Id.* (The jail has a rule that new
9 arrests can’t have visitors for 72 hours, but Plaintiff Mendoza states he was not informed of this
10 rule). *Id.* He talked to the person on the front desk, explained that he only had two days leave,
11 that he left his paperwork in North Carolina, and was going to try to get attached to the Marines
12 at Swan Island, but had not talked to them yet. *Id.*, at 3-4. Plaintiff Mendoza claims that he said
13 that he was not sure if he could get attached to Swan Island, and that if not, he would have to
14 return to North Carolina. *Id.*, at 4. Plaintiff Mendoza stated that he was told he would have to
15 see a supervisor. *Id.* Plaintiff Mendoza explained his situation again, and stated that the
16 supervisor told him to return around 5:00 p.m. and that they could “make it happen.” *Id.*

17 Scott Pilakowski, the corrections sergeant and supervisor on duty at the jail for the Clark
18 County Sheriff’s Office that day, filed a declaration in this case that states that Plaintiff Mendoza
19 told him that he had to return to North Carolina and that he was attempting to get an extension to
20 the United States Marine Corps office in Portland, “but that his request was not granted.” Dkt.
21 21, at 2. Sergeant Pilakowski further states that based on Plaintiff Mendoza’s statements, he
22 allowed Plaintiff Mendoza to visit Tara Mendoza. *Id.*

1 Plaintiff Mendoza states that he then drove to the Swan Island base, arriving around 1:00
2 p.m. Dkt. 84, at 4, refiled as redacted at Dkt. 90. He spoke to a female Marine, who he asserts
3 told him that they would have to verify his information with North Carolina because he arrived
4 without his leave paperwork. *Id.* Plaintiff asserts that around 3:00 or 4:00 p.m., he received a
5 call from “Sgt. Wick who told [him] they had verified the information with [his] North Carolina
6 command and they would officially attach [him] the following day.” *Id.*, at 5.

7 Plaintiff Mendoza states that he returned to the jail at 5:00 p.m. and visited Tara Mendoza
8 for about an hour. *Id.* He did not tell the jail personnel that his transfer to Swan Island had been
9 approved.

10 Defendant Hernandez states that she recognized Plaintiff Mendoza as he entered the jail
11 and made contact with him after he visited with Tara Mendoza. Dkt. 60, at 3. (Earlier that day
12 Defendant Hernandez called the jail and asked if Tara Mendoza’s property had been released;
13 she asserts that they told her it had been released to Karen Ruggiero, a friend of Tara Mendoza
14 and a witness in the child abuse case. Dkt. 60-1, at 18. She maintains that she then called Karen
15 Ruggiero who told her that she gave Tara Mendoza’s wallet and cell phone to Plaintiff Mendoza
16 around 8:00 a.m. that day. Dkt. 60-1, at 18.) Defendant Hernandez states that she asked Plaintiff
17 Mendoza if he had Tara Mendoza’s cell phone or iPad. Dkt. 60-5, at 4. Plaintiff Mendoza told
18 her he had the iPad in his vehicle, but did not know where Tara Mendoza’s cell phone was. Dkt.
19 60-1, at 19. Around 9:00 p.m., Plaintiff Mendoza signed a consent form and agreed to allow
20 Defendant Hernandez to search his vehicle. Dkt. 60-4, at 2. She found the iPad. Dkt. 60, at 3.
21 Defendant Hernandez told Plaintiff Mendoza not to contact anyone involved in the case for the
22 next three hours while she served search warrants related to the criminal case against Tara
23 Mendoza, and he agreed. Dkt. 60-5, at 4.

1 According to Defendant Hernandez, while serving the last warrant, Katherine Ruggiero
2 showed up on the scene looking for Taryn Park's (another witness to the child abuse case) cell
3 phone. Dkt. 60-5, at 4. Defendant Hernandez stated in her police report that Ruggiero told her
4 that she didn't know that a warrant was being served for Taryn Park's phone, but that about 30
5 minutes prior, Plaintiff Mendoza told her to get to Park's house and get Park's phone. *Id.* (In a
6 written statement Ruggiero stated that Plaintiff Mendoza asked about **pictures** of [L.M.] the
7 night he was taken into CPS custody, and she told him "on Tye's phone" and "he asked could
8 [she] obtain them," and she agreed. Dkt. 60-8, at 4. When Ruggiero asked him what was going
9 on, [Plaintiff Mendoza] told her he couldn't tell her then, but to call him at 2:30 a.m. *Id.*)
10 Ruggiero also purportedly stated to Defendant Hernandez that she thought Tara Mendoza's
11 phone was at Sandra Schatz's residence because Plaintiff Mendoza and she discussed Schatz
12 keeping the phone because Schatz was not involved in the case. Dkts. 60-5, at 4 and 60-8, at 2.

13 In a supplemental police report, Defendant Hernandez states that she called the Clark
14 County jail and spoke with Custody Officer Paddy on May 5, 2014. Dkt. 60-9, at 2. According
15 to her, Custody Officer Paddy was working at the visitor's desk around 5:00 p.m. on May 2,
16 2014 when Plaintiff Mendoza was trying to get into the jail to see Tara Mendoza. *Id.* Custody
17 Officer Paddy asserted that Plaintiff Mendoza told him "he may be shipped overseas and that he
18 had to leave the next day." *Id.* Custody Officer Paddy stated that Plaintiff Mendoza then met
19 with the supervisor to discuss his situation. *Id.* In a separate supplemental police report,
20 Defendant Hernandez states that Custody Officer Paddy and Sergeant Pilakowski were contacted
21 again on May 6, 2014 about 6:00 a.m. regarding Plaintiff Mendoza and his visit with Tara
22 Mendoza in the jail on May 2, 2014. Dkt. 60-1, at 20. Detective Hernandez relates:

23 Custody Officer Paddy said [Plaintiff Mendoza] was in his dress uniform when he
24 told him he was going overseas but would like to meet with his wife before he

1 left. Custody Officer Paddy notified Custody Sergeant Pilakowski and Sergeant
2 Pilakowski spoke with [Plaintiff Mendoza] alone. [Plaintiff Mendoza] told
3 Sergeant Pilakowski he was trying to get permission from the Portland office to
4 stay in the area but it was not granted. He also said [Plaintiff Mendoza] told him
5 that the military doctor had reviewed the medical records pertaining to L. and that
6 there was only one fracture and that it was the doctor's opinion that it was not
7 child abuse. Sergeant Pilakowski said that he then obtained permission from the
8 commander to allow [Plaintiff Mendoza] a visit.

9 Dkt. 60-1, at 20. Defendant Kipp states in a police report that she spoke to Sergeant Pilakowski
10 at Defendant Hernandez's request. Dkt. 61-1, at 3. Defendant Kipp asked Sergeant Pilakowski
11 if Plaintiff Mendoza "wanted the rules changed to accommodate him and [Sergeant Pilakowski]
12 said that [Plaintiff Mendoza] did not specifically ask that." Dkt. 61-2, at 3.

13 According to Defendant Hernandez, before 9:00 a.m. on May 6, 2014, she contacted U.S.
14 Marine Corp Major Chad Hailey at Swan Island. Dkt. 60, at 3-4. Major Hailey stated that on
15 May 2, 2014 around 2:00 p.m. he told Plaintiff Mendoza that he would be allowed to stay in
16 Washington through the duration of the [dependency] case involving L.M. Dkt. 60, at 3-4.

17 On May 6, 2014, Plaintiff Mendoza attended a 9:00 a.m. shelter care hearing for his son
18 in his dress military uniform. Dkt. 76-1, at 9. He was granted supervised visitation with L.M.
19 three times a week for two hours a visit. Dkt. 59-13, at 2.

20 Right after the hearing, Defendant Hernandez arrested Plaintiff at the courthouse for the
21 misdemeanor of making a false statement to a public servant when requesting to visit Tara
22 Mendoza on May 2 at the jail. Dkt. 60, at 4. Defendant Hernandez did not place Plaintiff
23 Mendoza in her car, which was in the courthouse parking lot, but, instead, walked him,
24 handcuffed, two blocks away to the police station. Dkt. 60, at 4-6.

Plaintiff Mendoza was detained until that evening at which time he posted bail and was
released. Dkt. 76-1, at 15. He was charged with the misdemeanor of making a false or

1 misleading material statement to a public servant contrary to RCW 9A.76.175. *City of*
2 *Vancouver v. Mendoza*, Clark County, Washington District Court case number 136892.

3 The next day, on May 7, 2014, Defendant Hernandez served a warrant for Tara
4 Mendoza's phone at Sandra Schatz's residence. Dkt. 60-5, at 4. Although the police did not find
5 the phone during the search, Schatz told them Plaintiff Mendoza had discussed her keeping the
6 phone and he had access to her property. Dkt. 60-5, at 4 and 60-8, at 3. Schatz later called the
7 police, reported she found Tara Mendoza's phone, and turned it over to them. Dkt. 60-5, at 4.

8 Plaintiff Mendoza was charged with tampering with evidence in connection with his
9 handling of Tara Mendoza's cell phone and criminal conspiracy with Sandra Schatz to conceal
10 the cell phone from police. *City of Vancouver v. Mendoza*, Clark County, Washington District
11 Court case number 136893. Plaintiff Mendoza was further charged with obstructing a law
12 enforcement officer related to sending Ruggiero over to Park's house the night he was told not to
13 discuss the case with anyone while Defendant Hernandez was serving warrants. *City of*
14 *Vancouver v. Mendoza*, Clark County, Washington District Court case number 136894.

15 Although Plaintiff Mendoza and Tara Mendoza attempted to reconcile their marriage for
16 a few months, after Tara Mendoza hit Plaintiff Mendoza with her car in July of 2014, a no
17 contact order was entered protecting Plaintiff Mendoza from contact with Tara Mendoza.
18 *Washington v. Tara Mendoza*, Clark County, Washington Superior Court case number 14-1-
19 01578. A separate no contact order was entered on August 5, 2014, protecting Plaintiff Mendoza
20 and L.M. from having contact with Tara Mendoza. *Mendoza v. Mendoza*, Clark County,
21 Washington Superior Court no contact order number 14-2-07709-6; in the record here at Dkt. 76-
22 1, at 22-25. Tara Mendoza pled guilty to assault in the third degree – domestic violence on
23 October 23, 2014, and was sentenced to jail time. *Washington v. Tara Mendoza*, Clark County,

1 Washington Superior Court case number 14-1-01578, Judgement and Sentence in the record at
2 Dkt. 76-1, at 26-38.

3 Plaintiff Mendoza filed a Petition for Declaration Concerning Validity of Marriage
4 (asserting the Mendozas' marriage was invalid because the divorce from her first marriage was
5 not final when they married) and requested that the court enter a parenting plan regarding L.M.
6 on August 28, 2014. *In re the Marriage of Carlos and Tara Mendoza*, Clark County,
7 Washington Superior Court case number 14-3-01748-8. The marriage was found not to be valid.
8 Dkt. 76-1, at 8. On September 17, 2014, a parenting plan was entered, prohibiting contact
9 between Tara Mendoza and L.M. *In re the Marriage of Carlos and Tara Mendoza*, Clark
10 County, Washington Superior Court case number 14-3-01748-8, in the record at Dkt. 76-1, at 39-
11 45.

12 On November 25, 2014, Plaintiff Mendoza moved to have the first dependency case
13 dismissed. *In Re the Interest of: [L.M.]*, Clark County, Washington Juvenile Court case number
14 14-7-00508-5, in the record at Dkt. 76-1, at 17. In his Declaration in support of the motion,
15 Plaintiff Mendoza informed the Court that Tara Mendoza's criminal trial on the child abuse
16 charges was scheduled to go to trial in January of 2015. *Id.*, at 18. He notified the Court that
17 there was "a no-contact order in the criminal case (14-1-00877-5) preventing [Tara Mendoza]
18 from having contact with [L. M.]," a "no-contact order in a protection order matter that [Plaintiff
19 Mendoza] filed (14-2-07709-6), preventing [Tara Mendoza] from contacting [Plaintiffs], a "non-
20 contact order preventing [Tara Mendoza] from having contact with me in the domestic violence
21 assault case against [Tara Mendoza] (14-1-01578-0), and a "no visitation clause in the temporary
22 parenting plan [Plaintiff Mendoza] obtained on September 17, 2014 (14-3-01748-8)." *Id.*
23 Plaintiff Mendoza further stated that he was in the military, being stationed out of state, and had
24

1 housing and daycare arranged for L.M. *Id.* He asserted that he understood DSHS is “not
2 opposed to a dismissal under these circumstances, as [L.M.] is and shall remain protected under
3 [his] care.” *Id.*, at 19.

4 Tara Mendoza was released from custody on bail around November 24, 2014. Dkt. 61-2,
5 at 2. A few days later, DSHS received a report that Tara Mendoza made contact with L.M. via
6 Skype in violation of the no contact orders. *Id.*

7 On December 4, 2014, the dependency case was dismissed; the court was not informed
8 that Tara Mendoza had allegedly made contact with L.M. Dkt. 76-1, at 46-47.

9 On December 8, 2014, Plaintiff Mendoza filed a motion in the criminal case *Washington*
10 *v. Tara Mendoza*, Clark County, Washington Superior Court case number 14-1-01578-0,
11 (charges related to Tara Mendoza hitting Plaintiff Mendoza with her car), to have the no contact
12 order between Plaintiff Mendoza and Tara Mendoza dismissed. Dkt. 98, at 29. Plaintiff
13 Mendoza stated:

14 CPS dismissed their action against my wife and I as relates to our son L. Based
15 upon all information I have received to date I intend to facilitate reunification of
16 the relationships damaged by what appear to be untrue allegations. As to this
incident I acknowledge it occurred but have no fear of her and I want her in our
son’s life.
Id.

17 On December 9, 2014, Plaintiff Mendoza moved to have the August 5, 2014 no contact
18 order (which was entered after Tara Mendoza hit Plaintiff Mendoza with her car) between Tara
19 Mendoza and both Plaintiffs lifted before they left for North Carolina. *Mendoza v. Mendoza*,
20 Clark County, Washington Superior Court case number 14-2-07709-6; in the record here at Dkt.
21 76-1, at 48. In his motion, Plaintiff Mendoza states, “[DSHS] dismissed their action against vs.
22 (petitioner and respondent) as it related to our son [L.M.] Based on all information I have
23
24

1 received to date I intend to facilitate reunification of the relationships damaged by what appear to
2 be untrue allegations.” Dkt. 76-1, at 48.

3 On December 10, 2014 at 9:53 a.m., Colin Hayes, the Clark County deputy prosecutor
4 who was handling Tara Mendoza’s criminal prosecution, emailed Defendants Kipp and
5 Hernandez (she was not working), and several other social workers, DSHS employees, and the
6 assistant attorney general, Sarra Yamin, who was assigned to the first dependency case. Dkt. 61-
7 3, at 2. He sent them a copy of Plaintiff Mendoza’s December 8, 2014 motion to have the
8 protective order between he and Tara Mendoza dismissed. *Id.* Mr. Hayes notes that “apparently
9 [Plaintiff Mendoza] wants Tara [Mendoza] to see L.[M.] again.” *Id.*

10 At 1:29 p.m., Mr. Hayes again emailed Defendant Kipp and the others, and informed
11 them that “Cheri Hoffman [a volunteer victim’s advocate] just spoke with [Plaintiff Mendoza] in
12 an effort to have him sign a HIPPA release . . . [Plaintiff Mendoza] told Cheri that he is in North
13 Carolina.” Dkt. 61-4, at 2. (That Plaintiffs were in North Carolina was not anticipated by the
14 Defendants; they were under the impression he was in California based on what Plaintiff
15 Mendoza told the assistant attorney general Yamin and others at DSHS in order to get the first
16 dependency dismissed. Dkts. 61-4, at 2 and 28, at 4. Plaintiff Mendoza states that it wasn’t until
17 December that he decided to go to North Carolina. Dkt. 69-1, at 45.) Defendant Kipp relates in
18 her police report that she talked with Ms. Hoffman. Dkts. 28, at 4 and 69-1, at 18-19. According
19 to Defendant Kipp, Ms. Hoffman told her that she talked with [Plaintiff Mendoza] and he very
20 clearly stated that he was in North Carolina, and gave her an address to mail documents. *Id.*
21 (Plaintiff Mendoza disputes this and asserts he told her he was on his way to North Carolina, not
22 that he was already there. Dkt. 84, at 9, refiled as redacted at Dkt. 90).

1 In any event, at 1:55 p.m. Beth Kutzera with DSHS emailed Defendant Kipp and asked if
2 she had Tara Mendoza's release address and Defendant Kipp responded at 2:02 p.m. that she
3 would try to find it. Dkt. 61-5, at 2. (Although at 2:25 p.m. Mr. Hayes sent Defendant Kipp and
4 others an email that giving an address he "believed" was Tara Mendoza's and included a
5 possible phone number, Defendant Kipp states that she doesn't remember seeing this email.
6 Dkts. 61-6, at 2 and 61, at 3.)

7 Defendant Kipp states that at this point she became "very concerned" that Plaintiff
8 Mendoza "was planning to expose L.M. to Tara Mendoza." Dkt. 61, at 3.

9 By 3:00 p.m., Tara Mendoza's whereabouts had still not been confirmed, Defendant Kipp
10 states that she "believed that L.M. was in imminent danger." Dkt. 61, at 3. She requested that
11 the Vancouver Police Department "ping" Plaintiff Mendoza's cell phone, and discovered that he
12 was in Vancouver, not North Carolina. Dkts. 61, at 3 and 64, at 2-3.

13 Vancouver police officers went to the last known location of Plaintiff Mendoza's cell
14 phone and found Plaintiff Mendoza's car. Dkt. 64, at 3. Clark County Deputy Sheriff Brendan
15 McCarthy began drafting an affidavit for a warrant to take L.M. back into protective custody.
16 Dkt. 62, at 2-4. While he was drafting the warrant, the officers at the scene saw Plaintiff
17 Mendoza get into his car and drive off. Dkt. 64, at 3. They followed, but were rear-ended by a
18 truck and had to stop. *Id.* Deputy McCarthy quit drafting the proposed warrant to take L.M.
19 back into protective custody and attempted to join the others following Plaintiffs, but did not find
20 them. Dkt. 62, at 2-4. Defendant Kipp, who was on the scene, followed Plaintiffs. Dkt. 28, at 5.

21 It turns out that Plaintiff Mendoza's soon to be new wife, Yesenia, who was in Newburg,
22 Oregon (just over the Washington/Oregon border) contacted Plaintiff Mendoza and asked him to
23 take her to the hospital. Dkt. 69-1, at 52-53. (He and Yesenia started dating in September of
24

1 2014. *Id.*) He put L.M. in the car seat, and drove over the Washington state border into Oregon.
2 *Id.*

3 Defendant Kipp followed Plaintiffs from their home over the Oregon border. Dkts. 28, at
4 5 and 69-1, at 19. She believed she had the authority to follow Plaintiffs pursuant to the Master
5 Interlocal Mutual Law Enforcement Assistance Agreement (“Interlocal Agreement”) between
6 the State of Washington and State of Oregon. Dkt. 77, at 20. It was around 6:00 p.m. and traffic
7 was heavy. Dkts. 28, at 5 and 69-1, at 19. Defendant Kipp inadvertently pulled up along
8 Plaintiffs’ car and saw Plaintiff Mendoza driving and L.M. in the backseat in a child car seat. *Id.*
9 She slowed down and got three cars behind them. *Id.* As they drove, she notified the Portland
10 Police Bureau and kept “calling out” their location to Portland police as they approached the
11 Tigard, Highway 99 Exit. *Id.* Eventually, the Portland police caught up to them, and pulled
12 Plaintiff over at Defendant Kipp’s request. *Id.*; and Dkt. 69-1, at 32.

13 Defendant Kipp approached and questioned Plaintiff Mendoza about his motion to have
14 the no contact order lifted. Dkts. 28, at 5 and 69-1, at 19. She states that Plaintiff Mendoza
15 initially denied having filed the motion, and then admitted it. *Id.* Defendant Kipp asked if
16 Plaintiff Mendoza if he know where Tara Mendoza was and whether he was attempting to take
17 L.M. to see Tara Mendoza. *Id.* He said “no” to both questions. *Id.* He told her that he decided
18 not to go forward with the motion to dismiss the no contact order. *Id.* Defendant Kipp asked
19 him why he told DSHS that he would be in California and then told Ms. Hoffman that day that
20 he would be in North Carolina, to which he asserted he “mis-spoke.” *Id.* Defendant Kipp took
21 L.M. and turned him over to DSHS social worker. *Id.*

22 A second dependency petition for L.M. was filed by DSHS on December 15, 2014.
23 *Dependency of L.M.*, Clark County Superior Court case number 14-7-01141-7; in record at 59-
24

1 16. In addition to recounting the history in the first dependency case, as justification for opening
2 this second dependency, the state pointed to Plaintiff Mendoza's motion, on December 8, 2014,
3 to have the no contact order that was entered in the criminal case (where Tara Mendoza hit
4 Plaintiff Mendoza with her car) between Plaintiff Mendoza and Tara Mendoza dismissed. *Id.*
5 The state argued that the statements Plaintiff Mendoza made in the motion to have the no contact
6 order lifted, "were in stark contrast to statements previously made by [Plaintiff Mendoza] . . . and
7 is not supported by any of the medical experts who have provided care and diagnosis of [L.M.]"
8 *Id.*, at 4. Further, the petition stated that Tara Mendoza was released from custody in November
9 of 2014, that they had information that Tara Mendoza had Skype contact with [L.M.] shortly
10 after her release. *Id.*, at 9. The court opened the dependency, and several shelter care hearings
11 were conducted. Dkts. 59-17, 59-18, 59-19, 94-1, at 3.

12 DSHS social worker Michael Wenndorf, who was assigned to the second dependency,
13 stated in his report that on January 21, 2015, during a supervised visit between Plaintiffs,
14 Plaintiff Mendoza advised him that "over the weekend, he realized some things he had not
15 [realized] previously. [Plaintiff Mendoza] spent time talking with [co-workers, family and
16 friends] and realize[d] he ha[d] never been willing to view Tara [Mendoza] as a possible
17 perpetrator . . ." Dkt. 80, at 5.

18 During a February 17, 2015 shelter care hearing, after several days of testimony, Clark
19 County Commissioner Schienberg held that there was reasonable cause to keep L.M. out of
20 Plaintiff Mendoza's care based on his lack of credibility and failure to protect L.M. Dkts. 59-19,
21 at 22 and 94-1, at 2-11. In making her determination she noted that Plaintiff Mendoza was
22 facing criminal charges that dealt with "his honesty" and "with him choosing to protect the
23 alleged perpetrator of his son's injuries." Dkt. 59-19, at 8. In assessing Plaintiff Mendoza's
24

1 credibility, she found that he “lies by omission. He lies by telling half the story and he lies by
2 telling half-truths.” *Id.*, at 9. The court indicated that the prior dependency was relevant in her
3 assessment of his credibility. *Id.*, at 9. It pointed out that “the reasons for the dismissal of the
4 original dependency . . . was because he told us . . . when we were dismissing [the first
5 dependency] he was going to California, he had to leave immediately, and that’s where he was
6 going to be stationed, and he was leaving like the next day or day after.” *Id.* Contrary to what he
7 told them, the court heard testimony from Plaintiff Mendoza’s military supervisor that Plaintiff
8 Mendoza “knew before he even went to court on the day it was dismissed he knew he wasn’t
9 going to California and that he was going . . . to North Carolina.” *Id.*, at 10. The court pointed
10 out that he moved to have the no contact orders rescinded in December right after the first
11 dependency was dismissed, finding: “the reality is if you read it in its entirety the plain language
12 of the declaration states that the purpose of the motion was for reunification between all parties
13 and specifically to enable the alleged perpetrator of the assault to have access to the child.” *Id.*,
14 at 14. The court found that Plaintiff Mendoza “doesn’t really believe that [Tara Mendoza’s]
15 guilty of harming his child” and “if there wasn’t a restraining order in effect in the criminal
16 matter that [Plaintiff Mendoza] would clearly allow [Tara Mendoza] to not only have contact,
17 but possibly have custody of this child. So, there is an imminent risk.” *Id.*, at 16 and 17.

18 On April 27, 2015, the second dependency case was dismissed. Dkt. 84, at 10-11, refiled
19 as redacted at Dkt. 90. L.M. now lives with Plaintiff Mendoza (who is still a Marine), his wife
20 Yesenia (they married in February 2015), and her other children in North Carolina. *Id.*, at 11.

21 On June 11, 2015, Plaintiff Mendoza pled guilty to “Disorderly Conduct 9A.84.030
22 Blocking Traffic,” an amended charge to the misdemeanor charge of making a material
23 misstatement to a public servant. *City of Vancouver v. Mendoza*, Clark County District Court
24

1 case number 136892; Dkts. 59-2, at 2 and 59-3. Plaintiff Mendoza stated in his plea:
2 “Alford/Newton plea – I do not believe I am guilty of the crime charged but plead guilty to take
3 advantage of the prosecutor’s deal because I recognize a jury could find me guilty if they
4 believed state’s witnesses and not me.” Dkt. 59-3, at 3. The charges that he tampered with
5 evidence (Tara Mendoza’s cell phone around May 2, 2014), conspired with Sandra Schatz (to
6 conceal the cell phone from police around May 2, 2014) and obstructed a law enforcement
7 officer were dismissed in a global resolution with the disorderly conduct plea. *City of Vancouver*
8 *v. Mendoza*, Clark County District Court case number 136893; in the record at Dkts. 59-5, at 2-3
9 and 59-6, at 2; and *City of Vancouver v. Mendoza*, Clark County District Court case number
10 136894; in the record at Dkts. 59-7 and 9-8.

11 On October 28, 2015, Tara Mendoza pled guilty to assault of a child in the third degree in
12 connection with her treatment of L.M. in the spring of 2014, and was sentenced to confinement.
13 Dkt. 59-10, at 2-10.

14 **B. PROCEDURAL HISTORY**

15 This case was filed on July 8, 2016 in Clark County, Washington Superior Court (Dkt. 2-
16 1, at 8) and removed to this Court on August 2, 2016 (Dkt. 1). Plaintiffs assert federal claims
17 against the Defendants for violations of: (1) Plaintiff Mendoza’s fourth amendment right against
18 being unlawfully seized on May 6, 2014, (2) both Plaintiffs’ fourteenth amendment right to
19 familial association, and (3) assert “*Monell*-related claims.” Dkt. 2-1. They make state law
20 claims for outrage, negligent infliction of emotional distress, malicious criminal prosecution,
21 wrongful interference with family relations, false arrest, false imprisonment, and negligent
22 investigation. *Id.*

1 In their response to Defendants' motion for summary judgment, Plaintiffs state that they
2 are no longer asserting a claim for negligent infliction of emotional distress. Dkt. 83, at 12. This
3 claim should be dismissed, and no further analysis is required.

4 **C. PENDING MOTIONS**

5 Defendants now move for summary dismissal of all claims. Dkt. 58. They assert that
6 there is no liability for Defendant Hernandez's arrest of Plaintiff Mendoza on May 6, 2014 under
7 federal law because: his federal claim for violation of his fourth amendment rights should be
8 dismissed because the claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), Defendant
9 Hernandez had probable cause to arrest him, and she is entitled to qualified immunity. *Id.*
10 Defendants assert that Plaintiffs' claims under state law related to Plaintiff Mendoza's May 6,
11 2014 arrest should also be dismissed. *Id.* Defendants move for dismissal of Plaintiffs' claim that
12 Defendant Kipp violated their fourteenth amendment right to family unity when she took
13 Plaintiff L.M. into protective custody on December 10, 2014 in Oregon, arguing that she is
14 entitled to qualified immunity. *Id.* Defendants assert that the federal claims asserted against the
15 City of Vancouver pursuant to *Monell* should be dismissed. *Id.* Defendants also argue that all
16 the state law claims for taking a child into protective custody in emergent situations absent proof
17 of gross negligence have been statutorily abolished, and so those claims should be dismissed. *Id.*

18 Plaintiffs respond and argue that the fourth amendment claim asserted against Defendant
19 Hernandez should not be dismissed because the claim is not barred by *Heck*, there was no
20 probable cause to arrest Plaintiff Mendoza, and she is not entitled to qualified immunity. Dkt.
21 83. Plaintiffs also oppose Defendants' motion for summary dismissal of their state law claims
22 for outrage, malicious criminal prosecution, false arrest, and false imprisonment related to
23 Plaintiff Mendoza's May 6, 2014 arrest. Dkt. 83, at 12-14. Plaintiffs argue that Defendant Kipp
24

1 lacked legal authority under the Interlocal Agreement and other statutes to take L.M. into
2 protective custody and violated various state laws (including kidnapping L.M.). *Id.* Plaintiffs
3 assert that Vancouver’s Policy 17.15.00, and specifically 17.15.02C “is so deficient as to amount
4 to deliberate indifference to L.M.’s constitutional right” because it “omits from the written policy
5 the requirement that a child cannot be picked up without a court order.” *Id.*

6 Defendants reply, arguing that all federal claims asserted against the Defendants
7 Hernandez and Kipp should be dismissed because they did not violate Plaintiffs’ constitutional
8 rights and even if they did, they are entitled to qualified immunity. Dkt. 95. They assert that the
9 federal claims asserted against the City should be dismissed because there is no evidence the
10 policy caused Plaintiffs a deprivation of their constitutional rights (as opposed to not meeting
11 requirements in state statutes) and there is no evidence of deliberate indifference. *Id.*

12 Defendants also argue that all Plaintiffs’ state law claims should be dismissed. *Id.*

13 Plaintiffs move for partial summary judgement on the following questions: (a) whether
14 Defendant Hernandez had legal authority to arrest Plaintiff Mendoza without a warrant on May
15 6, 2014 for a misdemeanor when the violation was not committed in her presence; (b) whether
16 Defendant Kipp “had probable cause to believe L.M. had been neglected;” and (c) whether
17 Defendant Kipp had legal authority under the Interlocal Agreement “when in Oregon to exercise
18 her authority under RCW 26.40.050 to remove a child located in Oregon from its parent without
19 a court order or warrant.” Dkt. 68.

20 Defendants oppose the motion, arguing that whether Defendant Hernandez violated state law
21 when she arrested Plaintiff Mendoza for a misdemeanor is relevant only to his state law claims of
22 false arrest and false imprisonment, not the federal claims, and because Plaintiffs didn’t file an
23 administrative claim with the City by May 6, 2016, as is required under state law, their motion
24

1 should be denied, and all claims related to this arrest should be dismissed. Dkt. 82. Defendants
2 argue that Defendant Kipp had probable cause to believe that Plaintiff Mendoza was taking L.M.
3 to see his abusive mother, and so was in imminent danger, and so the Plaintiffs' motion for
4 summary judgment should be denied. *Id.* Defendants point out that Defendant Kipp was a
5 sergeant-detective in a special law enforcement unit which, under the plain terms of the
6 Interlocal Agreement, enabled her to take L.M. *Id.* They also assert that she was authorized by
7 other state law, and so Plaintiffs motion should be denied. *Id.*

8 Plaintiffs reply, arguing that neither Defendants Hernandez nor Kipp had legal authority to
9 act as they did, and Defendant Kipp did not have probable cause to take L.M. into protective
10 custody. Dkt. 97.

11 Plaintiffs also file two motions to strike. Dkt. 68 and 97. Plaintiffs move to strike all hearsay
12 evidence and evidence regarding events occurring after December 10, 2014. *Id.* Defendants
13 filed a surreply in response. Dkt. 102.

14 **D. ORGANIZATION OF OPINION**

15 This opinion will first address Plaintiffs' motions to strike (Dkts. 68, refiled at 86 and 87; and
16 97), and then Defendants' motion to disregard late filed and over length pleadings (Dkt. 95).
17 The opinion will provide the standard on summary judgment, and then will address both parties'
18 motions (Dkts. 58 and 68) as they relate to (1) Plaintiffs' federal fourth amendment claim against
19 Defendant Hernandez for her arrest of Plaintiff Mendoza on May 6, 2014, (2) Plaintiffs' federal
20 fourth and fourteenth amendment claims against Defendant Kipp as it relates her taking L.M.
21 into protective custody on December 10, 2014, and (3) Plaintiffs' federal constitutional claims
22 asserted against the City of Vancouver under *Monell*. Lastly, this opinion will issue an order to
23
24

1 show cause why this Court has original jurisdiction, and if it doesn't, why the state law claims
2 should not be remanded to state court.

3 **II. DISCUSSION**

4 **A. PLAINTIFFS' MOTIONS TO STRIKE**

5 To the extent that Plaintiffs move (Dkts. 83, refiled at 86, and 87) to strike portions of
6 Defendants Hernandez and Kipp's police reports, search warrants, and other court documents as
7 hearsay evidence, the motion should be denied to the degree the statements relate to whether
8 Defendants Hernandez and Kipp thought they had probable cause to take the actions they did.
9 "Police may rely on hearsay and other evidence that would not be admissible in a court to
10 determine probable cause: Probable cause may be founded upon hearsay and upon information
11 received from informants, as well as upon information within the affiant's own knowledge that
12 sometimes must be garnered hastily." *Hart v. Parks*, 450 F.3d 1059, 1066 (9th Cir. 2006). To
13 the extent Plaintiffs move to strike other portions of the police reports and court documents, the
14 motion should be denied; but the evidence was of little utility in deciding this motion.

15 To the extent Plaintiffs move to strike evidence submitted regarding events occurring
16 after December 10, 2014 as irrelevant (Dkt. 97) the motion should be denied. Although the
17 information submitted was of marginal use, it provided further background and context for these
18 events.

19 **B. LATE FILED PLEADINGS**

20 To the extent that Defendants move the Court to refuse to consider Plaintiffs' pleadings, most
21 of which were filed at least a few days late and some of which were over-length, the motion
22 should be denied. There is a "strong policy underlying the Federal Rules of Civil Procedure
23 favoring decisions on the merits" whenever possible. *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th
24

1 Cir. 1986). Accordingly, it is error for a district court granted partial summary judgment “solely
2 on the basis of [a] local rule violation.” *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir.
3 1993).

4 **C. SUMMARY JUDGMENT STANDARD**

5 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
6 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
7 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
8 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
9 showing on an essential element of a claim in the case on which the nonmoving party has the
10 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
11 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
12 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
13 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
14 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
15 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
16 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
17 *Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
18 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

19 The determination of the existence of a material fact is often a close question. The court
20 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
21 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
22 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
23 of the nonmoving party only when the facts specifically attested by that party contradict facts
24

1 specifically attested by the moving party. The nonmoving party may not merely state that it will
2 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial
3 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
4 Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not
5 be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

6 **D. FEDERAL CLAIM FOR VIOLATION OF THE FOURTH AMENDMENT**
7 **RELATED TO THE MAY 6, 2014 ARREST OF PLAINTIFF MENDOZA**

8 Plaintiff was arrested for violation of RCW § 9A.76.175, which provides:

9 A person who knowingly makes a false or misleading material statement to a
10 public servant is guilty of a gross misdemeanor. "Material statement" means a
11 written or oral statement reasonably likely to be relied upon by a public servant in
12 the discharge of his or her official powers or duties.

13 The Defendants move, in part, for dismissal of Plaintiff Mendoza's Fourth Amendment
14 claim related to his May 6, 2014 arrest arguing that Plaintiff Mendoza's Fourth Amendment
15 rights were not violated because Defendant Hernandez had probable cause to arrest him, and
16 even if she did not have probable cause, she is entitled to qualified immunity. Dkt. 58. The
17 Court need not reach the other grounds Defendants assert because Defendant Hernandez should
18 be granted qualified immunity. Plaintiffs move for summary judgement on a related question:
19 whether Defendant Hernandez had legal authority to arrest Plaintiff Mendoza without a warrant
20 for a misdemeanor committed outside her presence? Dkt. 68.

21 *1. Defendants' Motion - Qualified Immunity on the Fourth Amendment Claim*
22 *Brought under § 1983?*

23 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the
24 conduct complained of was committed by a person acting under color of state law, and that (2)
the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other*

1 grounds, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to
2 remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769
3 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

4 Defendants in a Section 1983 action are entitled to qualified immunity from damages for
5 civil liability if their conduct does not violate clearly established statutory or constitutional rights
6 of which a reasonable person would have known. *Pearson v. Callahan*, 129 S. Ct. 808, 815
7 (2009) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity balances
8 two important interests: the need to hold public officials accountable when they exercise power
9 irresponsibly and the need to shield officials from harassment, distraction, and liability when
10 they perform their duties reasonably. *Harlow v. Fitzgerald*, 457 U.S. at 815. The existence of
11 qualified immunity generally turns on the objective reasonableness of the actions, without regard
12 to the knowledge or subjective intent of the particular official. *Id.* at 819. Whether a reasonable
13 officer could have believed his or her conduct was proper is a question of law for the court and
14 should be determined at the earliest possible point in the litigation. *Act Up!/Portland v. Bagley*,
15 988 F.2d 868, 872-73 (9th Cir. 1993).

16 In analyzing a qualified immunity defense, the Court must determine: (1) whether a
17 constitutional right would have been violated on the facts alleged, taken in the light most
18 favorable to the party asserting the injury; and (2) whether the right was clearly established when
19 viewed in the specific context of the case. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). This
20 Court has discretion to consider the second *Saucier* factor first, “whether the right was clearly
21 established,” *Pearson*, at 236, and will do so here.

22 “The relevant dispositive inquiry in determining whether a right is clearly established is
23 whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he
24

1 confronted.” *Id.* The plaintiff bears the burden of proving that the particular federal right alleged
2 to have been violated was clearly established at the time. *Pearson v. Callahan*, 555 U.S. 223
3 (2009).

4 The Fourth Amendment to the United States Constitution protects people against
5 “unreasonable searches and seizures.” “The ‘reasonableness’ and hence constitutionality of a
6 warrantless arrest is determined by the existence of probable cause.” *Barry v. Fowler*, 902 F.2d
7 770, 772 (9th Cir. 1990). “Probable cause requires only that those facts and circumstances
8 within the officer’s knowledge are sufficient to warrant a prudent person to believe that the
9 suspect has committed an offense.” *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir.
10 2015)(*cert. denied sub nom. Yousefian v. City of Glendale, Cal.*, 136 S. Ct. 135 (2015))(internal
11 quotations and citations omitted). “[A]n officer may not ignore exculpatory evidence that would
12 ‘negate a finding of probable cause.’” *Id.*, (quoting *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th
13 Cir. 2003)). “Probable cause is an objective standard. The arresting officers’ subjective
14 intention . . . is immaterial in judging whether their actions were reasonable for Fourth
15 Amendment purposes.” *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007).

16 “Even if the arrest was made without a warrant and without probable cause, however, the
17 officer may still be immune from suit if it was objectively reasonable for [them] to believe that
18 [they] had probable cause.” *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1078 (9th Cir. 2011).
19 “The law acknowledges that an otherwise competent officer will sometimes make an
20 unreasonable decision or make an unreasonable mistake as to law or fact. In those instances, the
21 officer will appropriately be liable under § 1983.” *Id.* “Framing the reasonableness question
22 somewhat differently, the question in determining whether qualified immunity applies is whether
23 all reasonable officers would agree that there was no probable cause in this instance.” *Id.*

1 Defendant Hernandez should be granted qualified immunity on the federal claims (not
2 state claims) related to whether she had probable cause to arrest Plaintiff Mendoza on May 6,
3 2014 for knowingly making a false or misleading material statement to a public servant contrary
4 to RCW § 9A.76.175. There is not a sufficient showing that “all reasonable officers would agree
5 there was no probable cause.” *Rosenbaum*, at 1078.

6 Defendant Hernandez saw Plaintiff Mendoza in his military uniform at the jail around
7 5:00 p.m. on May 2, 2014 in the waiting area. Dkt. 60-1, at 18. When Defendant Hernandez
8 arrested Plaintiff Mendoza, she knew that Custody Officer Paddy and Sergeant Pilakowski were
9 both working at the jail when Plaintiff Mendoza went to see Tara Mendoza around 5:00 p.m. on
10 May 2, 2014. Dkt. 60-9, at 2 and 60-1, at 20. Custody Officer Paddy told her that Plaintiff
11 Mendoza told him “he may be shipped overseas and that he had to leave the next day.” *Id.*
12 Custody Officer Paddy related that Plaintiff Mendoza then met with the supervisor to discuss his
13 situation. *Id.* Defendant Hernandez knew that Sergeant Pilakowski reported that Plaintiff
14 Mendoza “was trying to get permission from the Portland office to stay in the area but it was not
15 granted. He also said [Plaintiff Mendoza] told him that the military doctor had reviewed the
16 medical records pertaining to L. and that there was only one fracture and that it was the doctor's
17 opinion that it was not child abuse.” Dkt. 60-1, at 20. She was aware that Sergeant Pilakowski
18 “then obtained permission from the commander to allow [Plaintiff Mendoza] a visit.” Dkt. 60-1,
19 at 20. Defendant Hernandez was also aware from Major Hailey (the Marine she spoke with at
20 Swan Island) that Plaintiff Mendoza was informed on May 2, 2014, around 2:00 p.m., that he
21 would be allowed to stay in Washington through the duration of the dependency case involving
22 L.M. Dkt. 60, at 3-4.

1 Defendant Hernandez was entitled to rely on hearsay in deciding whether there is
2 sufficient probable cause for arrest, *Hart v. Parks*, 450 F.3d 1059, 1066 (9th Cir. 2006), and the
3 two jail officers and Marine she talked with appear to have given “reasonably trustworthy
4 information sufficient to lead a person of reasonable caution to believe that an offense has been
5 or is being committed by the person being arrested.” *United States v. Lopez*, 482 F.3d 1067,
6 1072 (9th Cir. 2007). Although Plaintiff Mendoza points out that he talked with the jail officers
7 late morning on May 2, 2014, and then returned for the visit, there is no evidence that Defendant
8 Hernandez was aware the conversations with jail staff occurred **before** Plaintiff was granted
9 permission to stay, and in any event, he did nothing to correct the misinformation after he
10 became aware that he could stay. Further, while Plaintiff Mendoza maintains that he did not
11 know the reason he was told he could not visit Tara Mendoza (the 72 hour no visit rule for new
12 arrests), it was not unreasonable for Defendant Hernandez to assume he knew why he was told
13 “no,” and persisted to try to convince the officers to allow him to see Tara Mendoza. The Fourth
14 Amendment tolerates objectively reasonable mistakes of fact or of law. *Heien v. North*
15 *Carolina*, 135 S. Ct. 530, 539 (U.S. 2014). While Sergeant Pilakowski stated that Plaintiff did
16 not state that he was asking for special treatment, considering the totality of the facts known to
17 Defendant Hernandez, the Court cannot say that “all reasonable officers would agree there was
18 no probable cause,” *Rosenbaum*, at 1078, for her arrest of Plaintiff Mendoza.

19 *2. Plaintiff’s Motion for Summary Judgment on Related Question*

20 To the extent the Plaintiffs move for summary judgment on their fourth amendment claim
21 by asserting that Defendant Hernandez violated Washington law by arresting Mr. Mendoza for a
22 misdemeanor committed outside her presence, their motion (Dkt. 68) should be denied. Under
23 RCW 10.31.100, a “police officer may arrest a person without a warrant for committing a
24

1 misdemeanor or gross misdemeanor only when the offense is committed in the presence of an
2 officer,” with listed exceptions that do not apply here. The Ninth Circuit has specifically
3 considered whether violation of RCW 10.31.100 (or other state laws requiring the officer be
4 present to arrest for a misdemeanor) constitutes a violation of the Fourth Amendment and has
5 concluded that it does not. *Alford v. Haner*, 446 F.3d 935, 937 n.2 (9th Cir. 2006)(rejecting
6 plaintiff’s argument that the violation of RCW 10.31.100 violated his fourth amendment rights);
7 *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990)(holding that the “requirement that a
8 misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not
9 grounded in the Fourth Amendment”). As it relates to the federal claim of violation of his fourth
10 amendment constitutional rights ONLY, Plaintiffs’ motion for summary judgment on whether
11 Defendant Hernandez violated Washington law by arresting Mr. Mendoza for a misdemeanor
12 committed outside her presence, the motion (Dkt. 68) should be denied.

13 **E. FEDERAL CLAIM FOR VIOLATION OF THE FOURTEENTH AMENDMENT**
14 **RELATED TO THE DECEMBER 10, 2014 INCIDENT INVOLVING L.M.**
15 **ASSERTED AGAINST DEFENDANT KIPP**

16 The Defendants move for dismissal of Plaintiffs’ Fourteenth Amendment claim related to
17 Defendant Kipp taking L.M. into protective custody on December 10, 2014 arguing that
18 Defendant Kipp is entitled to qualified immunity. Dkt. 58. Plaintiffs move for summary
19 judgement on a related questions: (a) whether Defendant Kipp “had probable cause to believe
20 L.M. had been neglected?” and (b) whether Defendant Kipp had “legal authority to under the
21 Interlocal Agreement “when in Oregon to exercise her authority under RCW 26.40.050 to
22 remove a child located in Oregon from its parent without a court order or warrant for a
23 misdemeanor committed outside her presence?” Dkt. 68.

24 **1. Defendants’ Motion - Qualified Immunity?**

1 The fourteenth amendment “substantive due process right to family integrity or to familial
2 association is well established. A parent has a ‘fundamental liberty interest’ in companionship
3 with his or her child.” *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011); (*quoting*
4 *Kelson v. City of Springfield*, 767 F.2d 651, 654–55 (9th Cir. 1985)). The Fourteenth
5 Amendment, then, “guarantees that parents will not be separated from their children without due
6 process of law except in emergencies.” *Rogers v. Cty. of San Joaquin*, 487 F.3d 1288, 1294 (9th
7 Cir. 2007)(*quoting Mabe v. San Bernardino County, Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101,
8 1107 (9th Cir. 2001)). Officials violate this constitutional right to familial unity “if they remove a
9 child from the home absent information at the time of the seizure that establishes reasonable
10 cause to believe that the child is in imminent danger of serious bodily injury and that the scope of
11 the intrusion is reasonably necessary to avert that specific injury.” *Id.* (*internal quotations*
12 *omitted*).

13 It is not clear from the Complaint whether Plaintiffs are also making a Fourth Amendment
14 claim on behalf of L.M. under the Fourth Amendment regarding L.M.’s having been taken from
15 his father without a warrant. Dkt. 2-1, at 19. The Complaint provides that “Defendants, in
16 violation of Plaintiffs’ right to familial association under the Fourteenth Amendment to the
17 United States Constitution, unlawfully and without [a] warrant, removed L.M. from the custody,
18 control, and care of [Plaintiff] Mendoza.” *Id.* It is immaterial for purposes of this analysis
19 because “the tests under the Fourth and Fourteenth Amendment for when an official may remove
20 a child from parental custody without a warrant are equivalent.” *Kirkpatrick v. Cty. of Washoe*,
21 843 F.3d 784, 789 (9th Cir. 2016). Accordingly, under both the Fourteenth and Fourth
22 Amendments, “seizing a child without a warrant is excusable only when officials have
23
24

1 reasonable cause to believe that the child is likely to experience serious bodily harm in the time
2 that would be required to obtain a warrant.” *Id.*, at 790.

3 As above, in considering whether an official is entitled to qualified immunity, the Court may
4 consider the second *Saucier* factor first: whether the Plaintiffs’ constitutional rights were clearly
5 established when viewed in the specific context of this case. *Pearson*, at 236. Again, “[t]o
6 determine whether a right is clearly established, the reviewing court must consider whether a
7 reasonable official would recognize that his or her conduct violated that right under the
8 circumstances faced, and in light of the law that existed at that time.” *Kirkpatrick*, at 792
9 (*internal quotations omitted*). Although “specific binding precedent is not required to show that
10 a right is clearly established, existing precedent must have placed the statutory or constitutional
11 question beyond debate.” *Id.* (*internal quotations omitted*).

12 Defendant Kipp should be granted qualified immunity for taking L.M. into protective
13 custody on December 10, 2014. “It was not beyond debate that the confluence of factors [here]
14 would not support a finding of exigency.” *Kirkpatrick*, at 793. The Friday night Defendant Kipp
15 took custody of L.M., she was aware that a few days after the dependency was dismissed (based,
16 in part, on Plaintiff Mendoza’s assertions that he was going to California with L.M. and there
17 were several no contact orders in place to protect L.M. from Tara Mendoza), Plaintiff Mendoza
18 moved to have at least some of the no contact orders dismissed, stating that:

19 CPS dismissed their action against my wife and I as relates to our son L. Based
20 upon all information I have received to date I intend to facilitate reunification of
21 the relationships damaged by what appear to be untrue allegations. As to this
incident I acknowledge it occurred but have no fear of her and I want her in our
son’s life.

22 Dkt. 98, at 29. She knew that one of the central issues in the first dependency was Plaintiff
23 Mendoza’s failure to recognize the danger Tara Mendoza posed to his baby. It was not
24

1 unreasonable for her to be concerned that a woman so irrational as to break eight bones in a one-
2 year-old baby's body would be highly unpredictable around the baby and that Plaintiff Mendoza
3 still did not appreciate the danger. Defendant Kipp reasonably thought that Plaintiff Mendoza
4 lied regarding his whereabouts a few hours earlier, telling staff he was in North Carolina when
5 he was still in Vancouver. She was aware that they had not been able to find Tara Mendoza and
6 that there were allegations that Tara Mendoza had made contact with the baby recently in
7 violation of the no contact orders. Defendant Kipp did not know where Plaintiff Mendoza was
8 headed. Even after she made contact with him, considering his prior interactions with her and
9 others at DSHS, it was not unreasonable for her to question his credibility. A reasonable officer
10 in Defendant Kipp's position would have cause to believe that L.M. is "likely to experience
11 serious bodily harm in the time it would have taken to get a warrant," that is, that he was "in
12 imminent danger of serious bodily injury." *Kirkpatrick*, at 790. Moreover, "[n]o Supreme Court
13 precedent defines when a warrant is required to seize a child under exigent circumstances,"
14 *Kirkpatrick*, 793, and Plaintiffs have failed to point to any Ninth Circuit cases that address the
15 circumstances alleged here. The federal constitutional claims asserted against Defendant Kipp
16 should be dismissed based on qualified immunity.

17 2. *Plaintiffs' Motion for Summary Judgment – on the Questions of Whether Defendant*
18 *Kipp had Sufficient Cause under State Statutes or Other Legal Authority to Take*
19 *L.M.?*

19 To the extent that Plaintiffs move for summary judgment against Defendant Kipp on their
20 federal constitutional claims by arguing that she did not have sufficient cause to take L.M. under
21 the state statutes or other legal authority under state law (Dkt. 68) the motion should be denied.
22 As was the case with Plaintiff Mendoza's Fourth Amendment claim, they make no showing that
23 they are entitled to relief under § 1983 due to an asserted violation of a state law. Moreover, as
24

1 above, she is entitled to qualified immunity as to their fourth and fourteenth amendment claims.
2 As the issues relate to their state law claims, this motion (Dkt. 68) should be stricken, as
3 explained below, to be renoted if appropriate.

4 **F. FEDERAL CONSTITUTIONAL CLAIMS AGAINST THE CITY OF**
5 **VANCOUVER PURSUANT TO *MONELL***

6 A county or municipality is responsible for a constitutional violation only when an action
7 taken pursuant to a county or municipal policy of some nature caused the violation. *Monell v.*
8 *Dep't of Soc. Servs.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In order to
9 successfully plead §1983 liability on the part of the City, Plaintiffs must allege: (1) they were
10 deprived of a constitutional right; (2) the City had a policy; (3) the policy amounted to a
11 deliberate indifference to their constitutional rights; and (4) the policy was the moving force
12 behind the constitutional violation. *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237
13 F.3d 1101, 1110–11 (9th Cir. 2001)(*internal quotations omitted*).

14 Plaintiffs' federal constitutional claims asserted against the City of Vancouver should be
15 dismissed because they failed to make a showing as to either prong (3) or (4). Plaintiffs assert
16 that the City of Vancouver's Policy 17.15.00, and specifically 17.15.02C "is so deficient as to
17 amount to deliberate indifference to L.M.'s constitutional right" because it "omits from the
18 written policy the requirement that a child cannot be picked up without a court order." Dkt. 83,
19 at 27. Plaintiffs cite to no authority that this proposition: "the requirement that a child cannot be
20 picked up without a court order" is based on federal law; they cannot, because as above, children
21 can be taken from their parents without a court order or warrant if the officer reasonably
22 concludes the child is "likely to experience serious bodily harm in the time it would have taken
23 to get a warrant," that is, that he was "in imminent danger of serious bodily injury." *Kirkpatrick*,
24 at 790. Further, Plaintiffs point to no evidence that the City's policy "amounted to deliberate

1 indifference to their constitutional rights.” They also do not show that the policy was “the
2 moving force behind the constitutional violation.”

3 To the extent Plaintiffs base their federal constitutional claims against the City of
4 Vancouver on a failure to train, the claim should be dismissed. “A municipality's failure to train
5 an employee who has caused a constitutional violation can be the basis for § 1983 liability where
6 the failure to train amounts to deliberate indifference to the rights of persons with whom the
7 employee comes into contact.” *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1186 (9th Cir.
8 2006). “The issue is whether the training program is adequate and, if it is not, whether such
9 inadequate training can justifiably be said to represent municipal policy.” *Id.* A municipal entity
10 can also be held liable if the plaintiff can establish that that entity failed to adequately supervise
11 employees. *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989). The standard for
12 entity liability under a failure to supervise theory is the same standard used under a failure to
13 train theory. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89 (1989); *Davis*, 869 F.2d 1230,
14 1235 (9th Cir. 1989). When a city is on actual or constructive notice that a particular omission in
15 their training program causes employees to violate constitutional rights, the city may be deemed
16 deliberately indifferent if the policymakers choose to retain that program. *Connick v. Thompson*,
17 131 S. Ct. 1350, 1360 (2011). Therefore, to prevail under a failure to supervise claim, a plaintiff
18 must first demonstrate that the entity was on notice of a constitutional violation, and then show a
19 conscious or deliberate choice between separate courses of action on the part of the entity
20 regarding its supervisory authority. *Price v. Sery*, 513 F.3d 962, 973 (9th Cir. 2008). Courts use
21 an objective standard to infer constructive notice of the risk where it was obvious. *Id.*

22 Plaintiffs’ claims against the City, based on a failure to train and or supervise, should be
23 dismissed. Plaintiffs failed to adequately show that policymakers were on actual or constructive
24

1 notice that their training programs or failures to supervise were causing violations of
2 constitutional rights. They fail to show the how the City acted with deliberate indifference. *See*
3 *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). Defendants’ motion (Dkt. 58) should be
4 granted as to these claims.

5 **G. STATE LAW CLAIMS**

6 Jurisdiction is a threshold issue that must be raised *sua sponte*. *Steel Co. v. Citizens for a*
7 *Better Environment*, 523 U.S. 83, 94-95 (1998). As is relevant here, a federal court has original
8 jurisdiction over cases involving federal questions, 28 U.S.C. § 1332, or where the parties are
9 diverse citizens and the amount in controversy is over \$75,000, 28 U.S.C. § 1331. A federal
10 court may exercise supplemental jurisdiction over state law claims asserted in cases in which the
11 court has original jurisdiction. 28 U.S.C. § 1367(a).

12 This case was removed based on federal question jurisdiction. Dkt. 1, at 2. As discussed
13 above, the federal claims are dismissed from the case.

14 It is not clear whether Court has original jurisdiction based on the parties’ citizenship. All
15 Defendants are Washington residents. The Complaint does not state whether Plaintiffs are still
16 residents of the state of Washington or whether they have become residents of North Carolina. It
17 provides that Plaintiff Mendoza “was a married person . . . and father of L.M., residing in Clark
18 County Washington and Onslow County, North Carolina.” Dkt. 20-1, at 8. The diversity
19 jurisdiction statute, 28 U.S.C. § 1332, speaks of citizenship, not of state of residency. *Kanter v.*
20 *Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). “A person's state citizenship is
21 determined by [their] state of domicile, not [their] state of residence. A person's domicile is
22 [their] permanent home, where [they] reside[] with the intention to remain or to which [they]
23 intend[] to return.” *Id.* A person is not necessarily a citizen of the state in which they reside for
24

1 purposes of the jurisdictional statute. *Id.* The Court is aware that Plaintiff Mendoza is active
2 duty military stationed North Carolina. It is not clear from the record whether Plaintiffs are
3 citizens of Washington or North Carolina. Moreover, it is not clear whether the value of the
4 remaining claims is over \$75,000.

5 Accordingly, it is not clear whether the Court has original jurisdiction based on diversity and
6 the amount in controversy. The parties should be ordered to show cause, if any they have, why
7 this Court has original jurisdiction over this case under 28 U.S.C. § 1332 by September 7, 2017.

8 If it does not have original jurisdiction, the Court will then need to consider whether to
9 exercise its supplemental jurisdiction over the remaining state law claims.

10 Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental
11 jurisdiction over a state law claims if: (1) the claims raise novel or complex issues of state law,
12 (2) the state claims substantially predominate over the claim which the district court has original
13 jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,
14 (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

15 “While discretion to decline to exercise supplemental jurisdiction over state law claims is
16 triggered by the presence of one of the conditions in § 1367(c), it is informed by the values of
17 economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999,
18 1001 (9th Cir. 1997)(*internal citations omitted*).

19 Although “it is generally within a district court's discretion either to retain jurisdiction to
20 adjudicate the pendent state claims” or dismiss them without prejudice, or if appropriate, remand
21 them to state court,” *Harrell v. 20th Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991), in the interest of
22 fairness, the parties should be given an opportunity to be heard on whether the case should be
23 remanded for further proceedings. Accordingly, the parties should be ordered to show cause, in
24

1 writing, if any they have, by September 7, 2017, why this Court should not decline to exercise
2 supplemental jurisdiction over the state law claims and remand the case to Clark County,
3 Washington Superior Court. In the meantime, Defendants' Renewed Motion to Exclude Gregory
4 Gilbertson (Dkt. 73) and the remaining issues in motions for summary judgment (Dkts. 58 and
5 68), which are based entirely on state law, should be stricken, but may be renoted if the Court
6 ultimately decides to exercise supplemental jurisdiction.

7 **III. ORDER**

8 Therefore, it is hereby **ORDERED** that:

- 9 • Plaintiffs' Motions to Strike (Dkts. 68 (refiled in the record at 86 and 87) and 97)

10 **ARE DENIED;**

- 11 • Defendants' Motion for Summary Judgment (Dkt. 58) **IS:**

12 ○ **GRANTED** as to the federal claims;

- 13 ■ The federal claims asserted against all Defendants **ARE**

14 **DISMISSED;**

15 ○ **STRICKEN** as to the state law claims;

- 16 • Plaintiffs' Motion for Partial Summary Judgment (Dkt. 68) **IS:**

17 ○ **DENIED** to the extent the motion applies to the federal claims;

18 ○ **STRICKEN** as to the state law claims; and

- 19 • Defendants' Renewed Motion to Exclude Gregory Gilbertson (Dkt. 73) **IS**

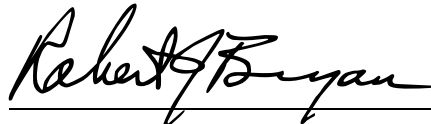
20 **STRICKEN**, to be renoted if the Court decides to exercise supplemental

21 jurisdiction over the state law claims;

- The parties are ordered to show cause, in writing, if any they have, why this Court has original jurisdiction over this case under 28 U.S.C. § 1332 by **September 7, 2017**;
- The parties are further ordered to show cause, in writing, if any they have, by **September 7, 2017**, why this Court should not decline to exercise supplemental jurisdiction over the state law claims and remand the case to Clark County, Washington Superior Court.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 29th day of August, 2017.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN
United States District Judge

LIST OF PEOPLE INVOLVED

Plaintiff Carlos Mendoza: father to Plaintiff L.M., former husband of Tara Mendoza and activity duty Marine;

Plaintiff L.M.: child of Plaintiff Mendoza and Tara Mendoza; Tara Mendoza pleaded guilty to assaulting him;

Tara Mendoza: Plaintiff Mendoza's first wife, mother of L.M., pleaded guilty to assaulting L.M.;

Defendant Vancouver Police Department Detective Monica Hernandez: arrested Plaintiff Mendoza on May 6, 2014; arresting officer and investing officer in the case against Tara Mendoza for abusing L.M.

Karen Ruggiero: a friend of Tara Mendoza and a witness in the child abuse case against Tara Mendoza; arrived at Taryn Park's home looking for Ms. Park's phone allegedly at Plaintiff's request while Defendant Hernandez was executing a warrant

Taryn Park: friend of Tara Mendoza and witness to the child abuse case against Tara Mendoza;

Sandra Schatz: owner of residence where Plaintiff Mendoza allegedly hid Tara Mendoza's phone;

Scott Pilakowski, the corrections sergeant and supervisor on duty at the jail for the Clark County Sheriff's Office on May 2, 2014, the day Plaintiff Mendoza visited Tara Mendoza contrary to jail rules;

Custody Officer Paddy: custody officer at the Clark County Washington jail; also working at the visitor's desk around 5:00 p.m. on May 2, 2014;

U.S. Marine Corp Major Chad Hailey: told Defendant Hernandez that on May 2, 2014 around 2:00 p.m. he told Plaintiff Mendoza that he would be allowed to stay in Washington through the duration of the [dependency] case involving L.M.;

Colin Hayes: the Clark County deputy prosecutor who was handling Tara Mendoza's criminal prosecution;

Sarra Yamin: the assistant attorney general who was assigned to the first dependency case.

Defendant Vancouver Police Department Detective Sergeant Barbara Kipp: took L.M. into protective custody on December 10, 2014;

Cheri Hoffman: a volunteer victim's advocate to whom Plaintiff allegedly told he was in North Carolina when he was still in Vancouver, Washington on December 10, 2014;

1 **Brendan McCarthy:** Clark County Deputy Sheriff that began drafting an affidavit for a warrant
to take L.M. back into protective custody; quit to help follow Plaintiffs

2 **Michael Wenndorf:** social worker assigned to the second dependency;

3 **Carin Schienberg:** Clark County, Washington Superior Court Commissioner who presided over
4 both dependencies;

5 **Yesenia Mendoza:** Plaintiff Mendoza's second wife and stepmother to Plaintiff L.M.